89-321 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE SANDOZ MASONRY CONTRACTORS, INC.
AND GRIFFITH MASONRY, INC.,
Petitioners,

v.

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUY DAVID KNOLLER
3550 North Central Avenue
Suite 1401
Phoenix, Arizona 85012
(602) 230-1099
Counsel for Petitioner

5100

QUESTION PRESENTED

Does the 6-year statute of limitations under the Multiemployer Pension Plan Amendments Act commence to run for collection of employer withdrawal liability from the date of employer withdrawal, or from the date of default after demand by a pension fund?

LIST OF PARTIES

Respondents John T. Joyce, *et al.*, appeared below as Trustees of the Bricklayers and Trowel Trades International Pension Fund; Petitioner is comprised of two separate and independent Arizona corporations: Clyde Sandoz Masonry Contractors, Inc., and Griffith Masonry, Inc. which Respondents have characterized below as "Clyde Sandoz Masonry, d/b/a Griffith Masonry." The two Arizona corporations comprising Petitioner are not publicly owned.

Amicus Curiae below was the Pension Benefit Guaranty Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases *Page*

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE SANDOZ MASONRY,
d/b/a GRIFFITH MASONRY,
Petitioner,

v.

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on March 31, 1989.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit is reported at 871 F.2d 119 (D.C. Cir. 1989) and appears in the Appendix hereto as "App. 1." The Order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing appears in the Appendix hereto as "App. 2." The Order of the United States District Court for the District of Columbia which has not been reported officially, appears in the Appendix hereto as "App. 3."

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit was filed on March 31, 1989. The Orders denying the motion for rehearing and suggestion for rehearing *en banc* were filed on May 19, 1989.

The jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974, Pub. L. 95-406, 88 Stat. 829 (codified in relevant part at 29 U.S.C. §§ 1001-1381 (1982 & Supp. IV 1986)), *as amended by* the Multiemployer Pension Plan Amendments Act 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1208 (codified in relevant part at 29 U.S.C. § 1381-1461 (1982 & Supp. IV 1986)).

Pertinent provisions of MPPAA (referred to hereinafter only by citation to the U.S. Code) are:

29 U.S.C. § 1001a (4)(A):

The Congress finds that –

Withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, *adversely affecting the plan,* its participants and beneficiaries, and labor-management relations, . . . (emphasis added)

29 U.S.C. § 1381:

(a) If an employer withdraws from a multiemployer pension plan in a *complete withdrawal* or a partial withdrawal, *then the employer is liable* to the plan in the amount determined under this part to be the withdrawal liability. (emphasis added)

29 U.S.C. § 1382:

When an employer withdraws from a multiemployer pension plan, the plan sponsor in accordance with this part, *shall* –

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) *collect* the amount of the withdrawal liability from the employer. (emphasis added)

29 U.S.C. § 1383:

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan

(b)(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if

(a) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

(A) An employer ceases to have an obligation to contribute under the plan, and

(B) the employer –

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

29 U.S.C. § 1399 (b) (1):

As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor *shall* –

(A) notify the employer of

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule. (emphasis added)

29 U.S.C. § 1399 (c) (5):

In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means —

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

29 U.S.C. § 1451 (a)(1):

A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to the multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(f) an action under this section may not be brought after the later of

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

STATEMENT OF THE CASE

Clyde Sandoz Masonry Contractors, Inc., (Sandoz) an Arizona corporation, had a collective bargaining agreement with the Bricklayer's Union which expired on June 30, 1981. The agreement required payments by Sandoz to the Bricklayers and Trowel Trades International Pension Fund (Fund). By letter dated April 21, 1981, Sandoz gave 60-days notice of its intention to terminate the collective bargaining agreement effective on its expiration date of June 30, 1981. As had been the custom for a number of years, Sandoz submitted monthly trust fund reports to the Fund. Sandoz submitted the last report for July, 1981, covering the period July 1 through July 15. No contributions were made by Sandoz to the Fund after July 15, 1981. No reports were made by Sandoz to the Fund for any period after July 15, 1981.

Between the date that the contributions were last made by Sandoz, July 15, 1981 (the date that the monthly reports also stopped), and for 6 years thereafter, the Fund did nothing to investigate whether there had been an employer withdrawal by Sandoz from the Fund until possibly on June 20, 1987. The Fund made no demand for withdrawal liability until July 13, 1987, which was made contemporaneously with the filing of the Complaint.

In the United States District Court for the District of Columbia below the Fund offered no evidence on why it

delayed making any claim for more than 6 years. Further there was no suggestion below that the Fund could not have determined the fact of withdrawal, assessed withdrawal liability, and collected it prior to 6 years after the date of Sandoz' withdrawal.

Sandoz was incorporated under Arizona law on September 30, 1968. On December 11, 1986, Sandoz elected to liquidate and dissolve the corporation because two-thirds of the shareholders had decided to retire from the business. Sandoz ceased doing business on March 25, 1987 (4 months before the Fund's suit was filed). Sandoz' contractors license was cancelled effective March 15, 1987.

Griffith Masonry Inc. was incorporated in the State of Arizona on January 23, 1987. It made application on February 19, 1987, to the Arizona Registrar of Contractors to obtain a license. On March 6, 1987, a contractor's license was issued to Griffith.

By the time two of the three shareholders retired and Sandoz ceased doing business in March, 1987, there had been no claim or notice of any kind regarding a claim by the Fund for withdrawal liability.

The Fund fortuitously learned for the first time on June 20, 1987, that there was a potential withdrawal liability of Sandoz merely because the Executive Director of the Fund happened to be in Phoenix, Arizona on that date. The Fund could have discovered the withdrawal liability anytime within the previous 6 years. Finally, on July 13, 1987, the Fund filed a Complaint seeking withdrawal liability from Sandoz. The Fund has never explained why it waited for over 6 years to determine and to collect an alleged $250,000.00 liability even though it had statutory and common-law fiduciary duties to do so.

A Motion to Dismiss the Complaint was filed jointly on behalf of Clyde Sandoz Masonry Contractors, Inc., and Griffith Masonry, Inc. On January 18, 1988, the motion was

granted on the basis that the Fund's Complaint had been filed more than 6 years after Sandoz had withdrawn from the Fund and was therefore barred by the statute of limitations (29 U.S.C. § 1451). The District Court reasoned that:

> "If indeed the statute of limitations did not begin to run until after the plan sponsor initiated collection procedures (29 U.S.C. § 1399), then there would be no time limit at all upon a funds' commencement of suit."

The Fund appealed from the decision of the District Court to the Court of Appeals for the District of Columbia Circuit. The Pension Benefit Guaranty Corporation filed a brief as *amicus curiae*. By its Judgment on March 31, 1989, the Court of Appeals vacated the District Court's decision, holding that the statute of limitations did not commence to run until there was a default after a demand by the Fund for withdrawal liability had been made. A default occurred in approximately December, 1987. Notice of default was sent by the Fund to Sandoz in October, 1987, giving Sandoz 60 days within which to cure the default. At this point the Court held, the statute of limitations began to run. That was 6½ years after Sandoz withdrew from the Fund.

It is from the Court of Appeals' Opinion that *certiorari* is sought.

REASONS FOR GRANTING THE WRIT

This case presents a first impression issue of significant national importance. The Court of Appeals' decision effectively eliminates the congressionally-intended limitations period of 6 years. As a result, employers contributing to multi-million dollar, multiemployer pension funds can be surprised by a stale claim of withdrawal liability brought *at any time* after they withdraw from a fund due to the decision below. The decision vests in pension funds complete discretion to determine if and when to commence the running of the statute of limitations, even if it is more than 6,

10, or even 100 years after withdrawal. This cannot be what Congress intended when it established a time bar of 6 years for the collection of withdrawal liability. Indeed, the ruling below is inconsistent with the underlying purpose of *any* statute of limitations. The legislative intent of MPPAA of collecting withdrawal liability payments promptly and protecting the financial integrity of the funds will be defeated unless *certiorari* is granted.

ARGUMENT

The 6-year statute of limitations commences to run when an employer withdraws from the fund, not when there is a default after demand by the fund.

The Court of Appeals' decision undermines the purpose of the statute of limitations in MPPAA. Limitation periods "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States v. Kubrick,* 444 U.S. 111, 118 (1979). A plea of limitations should be regarded as a meritorious defense, in itself serving a public interest. *See Guaranty Trust Co., v. United States,* 304 U.S. 126, 136 (1938). "Limitation periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, (1983); *Delaware State College v. Ricks,* 449 U.S. 250, 256–57 (1980).

By interpreting the 6-year statute of limitations as commencing only after there has been a default following demand for payment, the Fund is in complete control of the limitations period. The plaintiff therefore controls when the statute of limitations begins to run, in effect thus eliminating the statute of limitations as a defense. The purpose of avoiding stale claims and not allowing plaintiffs to sleep on their rights is defeated if the plaintiff can control the commencement of the statute of limitations.

As the Court of Appeals noted, MPPAA was enacted to insure the financial integrity of multiemployer pension funds. Congress clearly intended that the financial integrity be protected by the *expeditious* collection of withdrawal liability payments. That is precisely why the funds are required to notify an employer *promptly* of the amount of its liability, schedule liability payments, and demand payment. 29 U.S.C. § 1399(b)(1). MPPAA also mandates that the plan sponsor *shall* collect the withdrawal liability *when* an employer withdraws. 29 U.S.C. § 1382. Congress clearly intended the *expeditious* collection of withdrawal liability payments, and provided for a rapid dispute resolution procedure. Judicial resort is extremely limited. For these reasons, MPPAA has been characterized as a "pay-first-question-later" statute. *I.A.M. National Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 427 (D.C. Cir. 1987) (citations omitted).

The Court of Appeals decided that prompt collection "is one aspect of the Act's more general purpose of insuring that plans collect the amounts due from Employers . . . ." 871 F.2d at 1126. The Court reasoned that: "there is no indication that the Act requires, as Sandoz would have it, either prompt collection or no collection at all." *Id.* However, prompt collection certainly can be achieved within the *6 years* allowed by § 1451 without suggesting that there is either prompt collection or no collection. The Court's analysis is faulty when it suggests that collection within a 6 year period of time requires prompt collection or no collection. Collection should be prompt and it should be *within 6 years*. Any other interpretation ignores the 6-year limitations period (29 U.S.C. § 1451(f)), and the requirement of prompt assessment and collection immediately after withdrawal. (29 U.S.C. §§ 1382 and 1399(b)(1)). Allowing a fund 6 years within which to assert a claim for withdrawal liability is not establishing prompt collection, or no collection.

The cause of action arose, within the meaning of Section 1451(f)(1), at the time of withdrawal.

The limitations bar is triggered when the cause of action arose. The Court of Appeals decided that the cause of action did not arise until there was a default after demand (some 6½ years after withdrawal) because that is when the Fund was "adversely affected," within the meaning of § 1451(f)(1). The Court's reasoning allows trust funds to make demands for payment more than 6 years after withdrawal, as here, or even 10 years, or 50 years later. The Court's analysis also ignores the statutory statement that the withdrawal itself by a contributing employer *adversely affects* the plan. 29 U.S.C. § 1001(a)(4)(A).

A fund is *adversely affected* at the time of withdrawal because it is at that time that an employer ceases contributing to the plan. The fund loses at that time the benefit of investment income, which has been observed to be part of the Congressional concern evidenced in the legislative history of MPPAA. *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund,* 578 F. Supp. 1222, 1232 (D.D.C. 1984); *Carnation Co., Inc.,* 9 EBC 1409 (Arb. 1988); Remarks of Rep. Thompson, 29 Cong. Rec. H 7899 (Daily Ed., Aug. 26, 1980).

Withdrawal liability itself is determined as of the date of withdrawal (when the obligation to contribute ceases and operations continue under 29 U.S.C. § 1383). Moreover, there is withdrawal liability only if there exists at the time of withdrawal unfunded vested benefits. If there are unfunded vested benefits, the fund must be adversely affected at withdrawal because "by definition . . . [the fund] . . . does not have sufficient assets to invest the amount necessary to pay off those liabilities." *Carnation Co., Inc.,* 9 EBC 1409 (Arb. 1988). The fund, therefore, has an immediate need, recognized by Congress in MPPAA, to recover the withdrawn employer's prorated share of the unfunded vested benefits *promptly.* 29 U.S.C. §§ 1382 and 1399(b)(1).

The Court of Appeals has decided that there is no adverse effect until there is nonpayment after demand, even if, as here, the Fund has been deprived of the withdrawal

liability funds for 6½ years. In real economic terms, there was no negative economic change between the date of withdrawal when contributions ceased in the summer of 1981, and December, 1987 when the default occurred. Indeed, the Fund had already lost more than 6 years use of the withdrawal liability funds claimed to be due from Sandoz. The Fund lost interest on the funds. The Fund also risked the possible insolvency of the employer by delaying for so long.

To help in interpreting the statutory phrase "cause of action arose" to determine when a statute of limitations commenced, this Court has stated:

> "Such words are to be 'interpreted in the light of the general purposes of the statute and its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought'." *Crown Coat Front Co. v. United States,* 386 U.S. 503, 517 (1967).

Here, the statute provides for a 6-year limitations period. That is more than sufficient time within which to achieve the purposes of MPPAA. To interpret the phrase when the "cause of action arose," the legislative concern for *prompt* collection must be considered.

The Court of Appeals decided that there was no adverse effect until after default reasoning that the fund has to wait until there is a default before the cause of action arises. However, the Fund does not have to wait until there is nonpayment in order to bring a cause of action. "Default" is defined by the Act as including "a substantial likelihood that an employer will be unable to pay its withdrawal liability." 29 U.S.C. § 1399(c)(5)(B). An example is where an employer declares bankruptcy, makes an assignment for the benefit of creditors, or begins liquidating all of its assets. 49 Fed. Reg. No. 106, 22644 (5-31-84). That statutory definition of "default" clearly shows that nonpayment is not

the only event which would trigger the beginning of the limitations period.

Because the fund is adversely affected at the time an employer withdraws, liability arises then. An employer who withdraws from a fund incurs immediate withdrawal liability. 29 U.S.C. § 1381(a). An employer is "required *immediately* to begin to pay a fixed and certain debt owed to the plan." *Connors v. B. & W. Cole Co., Inc.*, 646 F. Supp. 164, 166 (D.D.C. 1986) *citing* 29 U.S.C. § 1381(a). *Accord, Peick v. PBGC,* 539 F. Supp. 1025, 1034 (N.D. Ill. 1982), *aff'd* 724 F.2d 1247 (7th Cir. 1983) (under MPPAA, a withdrawing employer becomes liable on the date of withdrawal).

Other labor laws lend support to Petitioner's interpretation.

Even assuming that the cause of action cannot be maintained until after demand is made and there is a default, the statute of limitations could nevertheless commence at the date of withdrawal. Other labor laws are analogous to this scheme. The Age Discrimination in Employment Act essentially provides that an action must be brought within 2 years of the date the cause of action arose. 29 U.S.C. § 626(e)(1). However, a cause of action cannot be immediately maintained. Administrative remedies must be pursued. No cause of action may be maintained until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. 29 U.S.C. § 626(d). Filing a charge with the EEOC is a prerequisite to filing suit in the same fashion that it may be viewed in this action that providing notice by the Fund in certain circumstances is a prerequisite to a withdrawal liability collection suit under 29 U.S.C. § 1451.

For limitation period purposes, a cause of action clearly arises under the Age Discrimination in Employment Act when the employer commits the discriminatory act – not when the EEOC charge has been filed. *See* 29 U.S.C.

§ 626(d)(1); *O'Connell v. Champion International Corp.*, 812 F.2d 393 (8th Cir. 1987).

Under the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq.*, this Court has held that the filing limitations period commenced when the alleged discrimination occurred and was communicated to the plaintiff even though one of the consequences of the discrimination did not occur until later. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Likewise, a claimant under the Fair Labor Standards Act is subject to the limitations period running from the date of the employer's act, irrespective of whether independent administrative relief was sought. *See* 29 U.S.C. §§ 201 *et seq.; Aguilar v. Clayton*, 452 F. Supp. 896 (D. Okl. 1978).

Statutory construction requires that the statute of limitations commences at withdrawal.

If, as the Fund has argued and the Court below found, the 6-year statute of limitations only runs from the date of default (nonpayment), then the 3-year statute of limitations within paragraph (2) of Section 1451(f) is rendered meaningless. There would be nothing to discover within 3 years under the discovery prong of 29 U.S.C. § 1451(f)(2), if only default after notice commences the running of the limitations period.

The interpretation of the Court of Appeals is contrary to a cardinal rule of statutory construction that: effect must be given to the entire statute and every part and word thereof, without rendering a part of the statute inoperative or nugatory. *E.g., FAA Administrator v. Robertson*, 422 U.S. 255 (1975).

In determining when MPPAA's statute of limitations starts running, the Court of Appeals did not look to the statutory object to be accomplished so as to construe the statute in a way which will be in accord with that object rather than one which will defeat it. *See, e.g., Blue Chip*

Stamps v. Mannor Drug Stores, Inc., 421 U.S. 723 (1975). The statutory object is not to allow for collection at any time; but to make a claim for collection promptly.

There is no unwieldy statutory collection mechanism under Sandoz' argument.

The Court of Appeals reasoned that Sandoz' argument was in some way unfounded because under § 1383(b) (the "withdrawal" definitional section) it would be unwieldy to determine if there was a withdrawal because any time after contributions cease there is a 5 year period during which there may be a resumption of operations by an employer in the building and construction industry in order to create withdrawal liability. However there is no "withdrawal" until and unless there is a resumption of operations within the 5 year period after contributions ceased. There is absolutely no "unwieldy statutory collection mechanism" because the statute of limitations could not commence to run until the date of withdrawal. There can be no "withdrawal" under the statutory definition for a building and construction industry employer during the five year period of time unless operations have resumed.

The Court of Appeals' suggestion that having withdrawal trigger the limitations bar involves some kind of "*post hoc* (and belated) determination" (871 F.2d at 1124) simply is incorrect. The same kind of determination has to be made for any application of the statute of limitations under MPPAA. It has to be determined that a withdrawal occurred (which may require waiting for 5 years after contributions have ceased from a building and construction industry employer to determine if there was a resumption of operations). Indeed, the same 5 year waiting period applies to both situations: limitations triggered by withdrawal or default after assessment and demand.

Moreover, the same point in time, under the Court of Appeals' analysis, has to be determined (any time within the 5 year period) in order to establish a date of withdrawal.

Establishment of the withdrawal date is a prerequisite to determining withdrawal liability, notifying the employer, and demanding payment.

In defining a "complete withdrawal" § 1383 clearly applies also to all industries other than the building and construction industry, in which event there is no 5 year waiting rule. The Court of Appeals did not address that aspect of the statutory provision. For an employer who is not in the building and construction industry, a complete withdrawal occurs when the obligation to contribute permanently ceases (even if there is a continuation of operations or a resumption within 5 years), or when all operations permanently cease. 29 U.S.C. § 1383(a).

If the Court of Appeals' decision is allowed to stand, there are no realistic incentives to induce prompt collection by a plan sponsor.

The Court of Appeals reasoned that plan sponsors may be sued for breach of fiduciary duty for an undue delay in collecting withdrawal liability, which would be an incentive not to delay collection. Such a contention is purely speculative. It is unlikely that a pensioner or other beneficiary is going to find the wherewithall to sue the plan trustees. It is also doubtful that there could be a breach of fiduciary duty for delay in collection when a default after demand (whenever the demand is made) commences the running of the statute of limitations.[1]

---

1 The Court of Appeals also held that the statutory mandate for expeditious collection by the Fund is an "issue" which Sandoz may raise at arbitration. 871 F.2d at 1127. However, it is illogical that an arbitrator would find merit in a *laches* defense based upon the fund's failure to follow the statutory mandate of §§ 1382 & 1399(b)(1), to collect promptly when the Court of Appeals has held that the Fund has commenced collection in a timely fashion. It would also seem to be a futile defense considering that *laches* cannot be raised dur-

The Court of Appeals also reasoned that another incentive to encourage prompt collection is the possibility that the plan because of its delay may not get interest from the date of withdrawal. This observation recognizes an "adverse effect" as of the date of withdrawal because interest is ordinarily calculated to run from the date of damage.

Congress certainly would not have been so concerned about the financial integrity of multiemployer pension trust funds and at the same time created such an ineffectual collection scheme which allows a statute of limitations to run from the date the fund decides it ought to start. During the 6½ year period of time here, there presumably were unfunded vested benefits (based upon the assessment of withdrawal liability).[2]

CONCLUSION

A default here occurred more than 6 years after withdrawal. Under the Court of Appeals' analysis, the lawsuit for collection 10, 50 or 100 years after withdrawal would still have been timely. It is unlikely that the purposes of the Multiemployer Pension Plan Amendment Act can be achieved if the statute of limitations can commence *at any time*, rather than at the date of withdrawal. Allowing a plaintiff to determine when the statute of limitations commences is without precedent and can certainly undermine or even defeat the purposes of MPPAA. Apart from the fact

---

ing the statute of limitations. *See e.g., United States v. Repass*, 688 F.2d 154, 158 (2d Cir. 1982).

[2] Since there are unfunded vested liabilities: ". . . by definition . . . [the fund] . . . does not have sufficient assets to invest the amount necessary to pay off those liabilities. To a significant degree it must look to the future contributions and withdrawal liability payments and to future investment earnings to pay those presently-vested benefits" *Carnation Co., Inc. and Central States Pension Fund*, 9 EBC 1409 (Arb. 1988).

that no funds are recouped in the interim, the withdrawing employer could be non-existent at the time the fund decides to demand payment; the employer could be insolvent; or, the fund could be insolvent.

Congress could have specifically tied the limitations period to a default after notice and assessment. It did not. To interpret the statute of limitations as running from the date of withdrawal for a 6-year period of time would accomplish all Congressional objectives expressed in MPPAA without excluding *prompt* collection. Trustees of these funds would be more apt to comply with their statutory and fiduciary duties, and follow the statutory mandate that they *shall* assess, notify, and demand payment *promptly*, if the statute of limitations commenced to run from the date of withdrawal. That would allow as long as 6 years within which to start an action to collect the assessed withdrawal liability.

Here the Fund simply slept on its rights. This is precisely the type of situation for which statutes of limitation are generally intended, and specifically intended by MPPAA. The Court of Appeals has in effect repealed the statute of limitations and undermined the statutory requirement of prompt collection.

The petition for *certiorari* should be granted.

Respectfully submitted,

Guy David Knoller
3550 N. Central Avenue
Suite 1401
Phoenix, Arizona 85012
Attorney for Petitioner
Clyde Sandoz Masonry Contractors, Inc. and Griffith Masonry, Inc.

August 15, 1989

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 22, 1989 Decided March 31, 1989

No. 88-7063

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND, ET AL., APPELLANTS

v.

CLYDE SANDOZ MASONRY, d/b/a GRIFFITH MASONRY

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 87-01894)

Ira Mitzner, with whom *George Kaufmann* was on the brief, for appellants.

Guy David Knoller, for appellee.

Gary M. Ford, Carol Connor Flowe and *Peter H. Gould* were on the brief for amicus curiae, urging reversal.

Before: STARR, WILLIAMS and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STARR.

STARR, *Circuit Judge*: This appeal requires us to determine whether a statutory time limitation bars a pension fund's suit to compel payments from an employer. The pension fund seeks relief under the Multiemployer Pension Plan Amendments Act ("MPPAA" or "Act"), which amended the Employee Retirement Income Security Act (ERISA) [1] to establish that participating employers who cease contributing to a covered pension fund are, in certain circumstances, liable to the fund for "withdrawal liability." The Act establishes a limitations period for bringing claims to recover payment of withdrawal liability. *See* 29 U.S.C. § 1451(f).

In the case before us, the trustees ("plan sponsors") of the Bricklayers and Trowel Trades International Pension Fund ("Fund") filed suit in federal district court to recover withdrawal liability from Clyde Sandoz Masonry, Inc., alleged to be doing business as Griffith Masonry, Inc. ("Sandoz" or "Sandoz Masonry").[2] The sponsors

[1] The Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (codified in relevant part at 29 U.S.C. §§ 1001-1381 (1982 & Supp. IV 1986)), *as amended by* The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1208 (codified in relevant part at 29 U.S.C. §§ 1381-1461 (1982 & Supp. IV 1986)).

[2] In other proceedings, but not before this court for relevant purposes, the parties contest the nature of the relationship between Clyde Sandoz Masonry, Inc. and Griffith Masonry, Inc. Without passing upon that issue and for the sake of convenience, we refer to the party/parties against which the plan sponsors claim and which may owe withdrawal liability as "Sandoz" or "Sandoz Masonry."

sors brought the action, however, considerably after the employer's complete withdrawal from the fund. The plan sponsors appeal the District Court's determination that the employer's complete withdrawal from the plan had triggered the operation of section 1451's limitations provision, which the trial court held barred the plan sponsors' suit. For reasons that we shall presently set forth, we agree that section 1451's limitations period does not bar the plan sponsors' suit.

I

The intersection of (1) the complicated statutory scheme governing collection of employers' withdrawal liability and (2) the plan sponsors' delay in pursuit of that collection in this case produces the conflict before us. Each aspect requires elaboration.

A

ERISA, as amended by the MPPAA, provides an elaborate system to ensure the financial integrity of multiemployer pension funds. *See generally, Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980). Congress passed the MPPAA in part because employers' withdrawals from multiemployer pension plans threatened those plans' solvency, and thus their ability to ensure that beneficiaries would ultimately receive benefits that were their due. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 213-17 (1986); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 721-25 (1984); *I.A.M. Nat'l Pension Fund, Plan A v. Clinton Engines Corp.*, 825 F.2d 415, 416-17 (D.C. Cir. 1987).

The Act requires employers who cease contributing to a multiemployer fund to pay what the statute refers to as "withdrawal liability," a sum that represents a portion of the fund's "unfunded vested benefits." *See* 29 U.S.C. §§ 1381, 1399; *see also Connolly*, 475 U.S. at 216-

17. That sum is based upon the employer's date of "complete withdrawal" from a multiemployer plan. *See id.* §§ 1383, 1391. Special provisions define the "complete withdrawal" of employers, like Sandoz, engaged in the construction and building trades. *See id.* § 1383(b).

The MPPAA grants the plan sponsor broad authority to assess and collect withdrawal liability. The Act requires that the fund "[a]s soon as practicable after an employer's complete . . . withdrawal" (1) calculate the employer's withdrawal liability, (2) set forth a schedule of payments, and (3) demand that the employer make payments pursuant to that schedule. *See id.* § 1399(b)(1). Those plan determinations are entitled to substantial deference in subsequent arbitration proceedings. *See id.* § 1401 (a)(3). If no arbitration has been initiated within the prescribed period, the amounts demanded are "due and owing on the schedule set forth by the plan sponsor" and subject to a plan sponsor's suit for collection. *Id.* § 1401(b)(1). If the employer fails within 60 days to meet a payment (following notice of that failure), section 1399(c)(5)(A) deems the employer to be in default and allows the plan sponsor to "require immediate payment of the outstanding amount of an employer's withdrawal liability." *See id.* § 1399(c)(5).

The parties are in dispute as to the time bar upon plan sponsor suits to collect withdrawal liability. Section 1451, which governs civil actions for withdrawal liability, provides that "[a] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." *Id.* § 1451(a)(1). The same section contains the limitations provision, the meaning of which is pivotal to this case:

> An action under this section may not be brought after the later of—

> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

Id. § 1451(f).

B

From 1977 until June 30, 1981, when the collective bargaining agreement between Sandoz and the bricklayers' union expired, Sandoz contributed to the Fund in accordance with that agreement. For some days thereafter, the parties negotiated over a new agreement, but on July 16, 1981 Sandoz implemented its final offer to the union. That offer did not include an obligation to contribute to the Fund. J.A. at 6. In August 1981, Sandoz filed a report and made payments to the Fund for work performed during the period from July 1 to July 15, 1981. *Id.* at 4. Sandoz made no subsequent contributions to the Fund, but did submit monthly reports "for at least 4 years." Brief for Appellee at 2.

In December 1986, Sandoz elected to dissolve; in March 1987, the corporation ceased doing business and had its contractor's license cancelled. Griffith Masonry, Inc., was incorporated in January 1987, and obtained its contractor's license in March 1987. *See supra* n.2.

In June 1987, while attending a local union meeting in Arizona, a Fund director received information that prompted the Fund to investigate whether Sandoz had completely withdrawn from the plan. The Fund sent notice to Sandoz of its withdrawal liability on July 13, 1987, and provided a payment schedule. On the same day, the Fund filed suit in District Court to collect the entire amount of withdrawal liability. On October 8, 1987, the Fund informed Sandoz that Sandoz had failed

to make the first scheduled payment of withdrawal liability, and thus would be in default if the failure were not cured within 60 days. Sandoz made no withdrawal liability payments.

By order of January 19, 1988, the District Court dismissed the Fund's complaint. The court held that section 1451(f)'s six-year time bar ran from the date of the employer's complete withdrawal, which the court determined to be the expiration date (June 30, 1981) of the collective bargaining agreement.[3] J.A. at 17-18. With

[3] The District Court reasoned that the employer "cease[d] to have an obligation to contribute" (a crucial predicate to determining the date of complete withdrawal, *see* 29 U.S.C. §§ 1383(a), (b)(2)(A)) upon the termination of the collective bargaining agreement rather than upon impasse. J.A. at 17. The court also concluded that in any case only the National Labor Relations Board could determine impasse and any pre-impasse obligation to contribute. *Id.* at 18.

Both elements of this reasoning were, with all respect, flawed. First, impasse rather than expiration or termination of the collective bargaining agreement marks the cessation of the employer's obligation to contribute. The obligation to contribute arises under a collective bargaining agreement or "as a result of a duty under applicable labor-management relations law." 29 U.S.C. § 1392(a). One elementary duty under applicable law is to bargain in good faith—a duty which has been interpreted to require, among other things, that the employer adhere to the terms of the collective bargaining agreement after the agreement's expiration but before the parties have negotiated to impasse. *See, e.g.,* 29 U.S.C. § 158(a)(5) (the duty to bargain collectively); *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 108 S. Ct. 830, 833 n.6, 834 (1988); *NLRB v. Katz,* 369 U.S. 736, 742-43 (1962). The obligation to contribute thus continues until impasse.

Second, arbitrators and trial judges must assess impasse in cases such as the one before us to determine when the employer's obligation to contribute ceased. *See Laborers Health and Welfare Trust Fund,* 108 S. Ct. at 837 n.19 ("[D]istrict courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal.").

the events so interpreted, the Fund had initiated its suit, filed July 13, 1987, beyond the six-year period allowed by section 1451. *Id.*

Joined by the Pension Benefit Guaranty Corporation (the government-owned entity that administers aspects of ERISA) as amicus curiae, the plan sponsors argue on appeal that, in this case, section 1451's time bar must be calculated from the time the employer fails to make a payment demanded by the Fund.

II

The parties have narrowed their dispute to a single issue of statutory interpretation: What acts or omissions trigger section 1451(f)'s time bar as applied to efforts to collect withdrawal liability? The parties agree that this case is not directly governed by the discovery element of section 1451's time bar (section 1451(f)(2), limiting the action to when "the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action"), but rather by section 1451(f)(1)'s limitation of actions to "6 years after the date on which the cause of action arose." The ambiguity (and the heart of the case) lies in the phrase "cause of action."

As is appropriate in the interpretive enterprise, we first examine the statutory language. Section 1451(f), by its terms, governs any "action under this section," a phrase which points us to section 1451(a)'s provision for an action by "[a] plan fiduciary . . . who is adversely affected by the act or omission of any party under this subtitle." A "cause of action" might thus be thought to arise upon the section 1451(a)(1) "act or omission." However, this recognition only brings us to the crux of the dispute; the parties differ sharply over what act or omission gives rise to the cause of action. Sandoz (supported by the District Court) deems that act to be the employer's complete withdrawal; in contrast, the plan

sponsors believe the relevant omission to be the employer's failure to meet the Fund's demand for payment.

A

The statute, it seems to us, indicates that the plan is "adversely affected" (and thus that a "cause of action" arises) when the plan has not received payments which are due and owing. The language of the statute (including the terms of section 1451 itself) points firmly in the direction of the conclusion that Sandoz's uncured failure to pay the sum demanded adversely affected the plan, thus giving rise to a cause of action.[4] *See* 29 U.S.C. §§ 1399(c)(5), 1401(b). Additional support emerges in the statute's pervasive distinction between withdrawal liability and a plan's ability to receive payment of portions or the entirety of that sum.

First. The statute's express terms link a plan's ability to pursue judicial relief to an employer's failure to meet a payment demanded by the plan. Most directly, section 1401(b)(1) provides:

> If no arbitration proceeding has been initiated . . . , the amounts demanded by the plan sponsor under section 1399(b)(1) . . . shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

Additionally, the Act indicates that when the employer is in "default," the "plan sponsor may require immediate payment of the outstanding amount of an employer's

---

[4] Other concerns may govern consideration of when the plan is adversely affected by the employer's default, caused by reasons other than the failure "to make, when due, any payment under this section." 29 U.S.C. § 1399(c)(5)(A); *see id.* § 1399(c)(5)(B) ("default" established by "any other event defined in the rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability").

withdrawal liability." *Id.* § 1399(c)(5). "Default," for purposes of this case, occurs when the employer fails to make "any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." *Id.* § 1399(c)(5)(A).[5] For both of these sections, the plan sponsor's demand for payment triggers the employer's obligation to pay, and the employer's failure to make the scheduled payment in turn provides the predicate for a plan sponsor's suit. That is to say, the failure to pay gives rise to a cause of action.

Second. The statute carefully distinguishes between the circumstances that define complete withdrawal and those which give rise to a cause of action. In the statutory scheme, the date of "complete withdrawal" functions to demarcate or to allow calculation of the employer's share, if any, of the plan's unfunded vested benefits. *See id.* § 1391. The statute directs the plan "[a]s soon as

---

[5] In this case, "default" occurred considerably after the plan sponsors filed this suit. Because the initial demand and schedule of payments accompanied notice of the July 13, 1987 filing of suit, Sandoz did not fail to meet its first scheduled payment until September 1987 and was not in default on the entire withdrawal liability until 60 days after the plan sponsors' subsequent notice of that September failure. *See* 29 U.S.C. § 1399(c)(5)(A); J.A. at 11-12; Transcript of Hearing on Motion to Dismiss 31-32, *Joyce v. Clyde Sandoz Masonry, Inc.*, Civ. No. 87-1894 (Dec. 16, 1987) [hereinafter "Tr."].

The plan sponsors defend their premature filing as an attempt to protect their claim in the event that section 1451(f) was held to be triggered by the employer's complete withdrawal (as the District Court in fact held). *See* Brief for Appellants at 5-6; Tr. at 31-32. While the sponsors' delay in demanding payment is unfortunate, intervening events have essentially cured the problem of premature filing for purposes of our consideration of the limitations issue. We see no unfair detriment to Sandoz in this conclusion. *But see infra* p. 19 (Sandoz retains opportunity to challenge plan sponsors' demand as not made "[a]s soon as practicable").

practicable after the employer's complete . . . withdrawal" to calculate the employer's liability, notify the employer of the amount of the liability, set forth a schedule for liability payments, and then demand payment according to that schedule. *See id.* § 1399(b)(1).

So long as the employer does not default in payment, the plan is not harmed by the withdrawal (in the sense related to the redress the suit seeks, *see infra* pp. 11-12). Indeed, that result is the fundamental purpose and consequence of the MPPAA. By virtue of withdrawal alone (apart from the liability calculation and demand for payment), the employer is not immediately obligated to make payments, nor is the plan by virtue of withdrawal alone entitled to receive any such payments. Withdrawal, in itself, does not visit any adverse effect upon the plan that gives rise to the cause of action. *See id.* § 1451(a); *infra* pp. 11-12.

This case provides unusual evidence of how the date of complete withdrawal functions within the Act as the basis for calculating the amount of withdrawal liability, but does not itself immediately give rise to the employer's obligation to make (or, more to the point, the plan's entitlement to receive) payments of that liability. In the usual case,

> a complete withdrawal from a multiemployer plan occurs when an employer—
>
> (1) permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1383(a). This determination cannot necessarily be made upon complete withdrawal; rather, it requires a post hoc determination of when a particular cessation of covered operations, for example, actually signaled a permanent halt to (rather than a lull in) operations. The peculiar nature of the construction industry,

a peculiarity reflected in the Act, compounds this problem of uncertainty. For many employers in the building and construction industries, the employer's complete withdrawal may not occur unless the employer "ceases to have an obligation to contribute under the plan" and "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." *Id.* § 1383(b)(2). That is, the plan sponsor (or any other party) may not be able to establish that the building or construction industry employer has completely withdrawn until as much as five years after what the parties eventually determine to have been the date of complete withdrawal. To conclude that an event requiring such a post hoc (and belated) determination triggers the limitations bar would create, at the least, an unwieldy statutory collection mechanism.

In sharp distinction to the date of complete withdrawal, the plan's unmet demand for payment operates rather differently. Quite simply, failure to meet the demand gives rise to the injury which the suit is designed to redress (and thus to a "cause of action"). Once the employer receives the plan's demand for payment, then (and only then) does the employer's obligation to pay arise. When, and only when, the employer fails to meet that demanded schedule of payments (and fails to cure that failure) has the plan been harmed (and thus becomes entitled to maintain its claim against the employer).

To return to the crucial statutory language: The plan is "adversely affected by the act or omission of any party . . . with respect to a multiemployer plan," *id.* § 1451(a), only once it fails to receive the payment it has demanded and to which it is entitled. The employer's complete withdrawal, without more, is an occurrence that hardly affects the plan adversely, but merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and

payment. The employer's complete withdrawal is, to be sure, a predicate to the plan's demand for payment. But only an unmet demand removes a dispute from these routine occurrences in the world of the MPPAA and creates the special and distinct harm that casts the dispute into the traditional adversarial arena, an arena that might be thought to require a statutory limitations period upon suits seeking judicial relief.

Additionally, the Act recognizes that the plan has been "adversely affected" by an unmet demand upon the employer by making the demanded amount of withdrawal liability "due and owing." *Id.* §§ 1401(b), 1451. *Cf. United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 132-34 (3d Cir. 1986) (29 U.S.C. §§ 1399 (c) and 1451 establish cause of action based upon adverse affect on plan of failure to receive demanded payment, even during pendency of arbitration), *aff'd by equally divided Court*, 481 U.S. 735 (1987). Upon default, the entire amount of withdrawal liability may be demanded, and thus become due and owing. The "act or omission" "adversely affect[ing]" the plan, of course, establishes when the cause of action arises. 29 U.S.C. § 1451.

Finally, we are heartened that other tribunals have with near uniformity favored the interpretation that we adopt today. *See, e.g., Korman Corp. v. Teamsters Pension Fund,* 10 Employee Benefits Cas. (BNA) 1608 (1988); *Ludington News Co. v. Michigan United Food and Commercial Workers Unions and Drug and Mercantile Employers Joint Pension Fund,* 9 Employee Benefits Cas. (BNA) 1913 (1988). *But cf. Combs v. Western Coal Corp.,* 611 F. Supp. 917, 920 (D.D.C. 1985) (in dictum, assuming without argument that time bar is calculated from withdrawal for purposes of laches analysis). Those cases, too, though without precedential effect in our circuit, have found relevant the distinction between with-

drawal liability and an unmet demanded payment. *See Ludington News Co.*, 9 Employee Benefits Cas. (BNA) at 1916-18. Consequently, they, too, recognize that "only after demand is made *and* refused [do] the provisions of 29 U.S.C. [§ 1451(f)] apply[,] for no cause of action arises until at least the Employer refuses to meet the demand of the Fund." *Korman Corp.*, 10 Employee Benefits Cas. (BNA) at 1615.

B

The arguments advanced by Sandoz Masonry to support the competing interpretation (that the cause of action arises upon the employer's complete withdrawal from participation in the plan) are peculiarly unpersuasive.

First, Sandoz argues that the date of complete withdrawal establishes the time when the cause of action arises, Brief for Appellee at 8, apparently because section 1383 (determining the date of complete withdrawal) gains relevance from section 1381's provision that, "[i]f an employer withdraws from a multiemployer plan in a complete withdrawal . . ., then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381; *see id.* § 1383.

This argument, however, fails to distinguish between the concept of withdrawal liability (which section 1381 addresses) and the issue when a cause of action arises, thus triggering section 1451(f)'s application to a plan sponsor's suit to recover payments of that liability (which is, of course, the issue before the court). As we have examined at length, *see supra* pp. 9-12, the Act sharply distinguishes between the existence and amount of withdrawal liability, on the one hand, and, on the other, both the preconditions for maintaining a suit and "the act or omission" that "adversely affected" the plan. *See* 29 U.S.C. § 1451(a); *see also id.* §§ 1381, 1383, 1391, 1399. The nature of a cause of action and

the terms of section 1451(a) indicate that only those last two concerns indicate when a cause of action arises, and in turn shape the operation of section 1451(f).

Second, Sandoz argues that the full language of the time bar supports its view of when a cause of action arises. *See* Brief for Appellee at 9. The employer claims that only its interpretation gives effect to section 1451 (f)(2), the "discovery prong" of the time bar. *See* 29 U.S.C. § 1451(f) (requiring actions to be brought within the later of 6 years from the accrual of the cause or, as indicated in section 1451(f)(2), three years following discovery of the cause); *supra* p. 5. To link the cause of action to the failure to meet the plan sponsors' demand, Sandoz argues, assumes that the plan has discovered the withdrawal and thus would render meaningless section 1451(f)(2). *See* Brief for Appellee at 9.

This argument misconstrues the function of section 1451(f)'s time bar. If the bar applied only to plan sponsors' suits to collect delinquent withdrawal liability payments, the argument would carry some weight. However, the time bar applies to "[a]n action under this section." Section 1451, situated at the beginning of the subtitle part entitled "enforcement," is hardly limited to the type of suit before us. Instead, section 1451 applies to suits brought by a wide variety of parties. *See* 29 U.S.C. § 1451(a)(1) ("A plan fiduciary, employer, plan participant, or beneficiary who is adversely affected . . ., or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both."). Additionally, the section applies to recovery by a party "adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan." *Id.* That subtitle, 29 U.S.C. §§ 1381-1453 (governing, among other things, employer withdrawals, transfers of plan assets, reorganizations of plans, and benefits after termination

of plans), extends to matters far beyond collection of withdrawal liability. Like suits involving these other parties adversely affected in these other matters, even suits brought by plan sponsors seeking to claim withdrawal liability may perhaps independently rely upon the discovery prong of the time bar when "default" occurs for reasons other than the employer's failure to meet a sponsor's demand for payment. *See id.* § 1399 (c)(5)(B) (plan rules to indicate events establishing default); *supra* n.4. That is, in a host of claims arising out of the subtitle, section 1451(f)(2) retains independent significance even following our ruling today. Unsurprisingly in light of the statutory structure supporting our interpretation, *see supra* pp. 7-12, our conclusion about what triggers section 1451(f)(1)'s time bar in this narrow range of cases does not render section 1451 (f)(2) mere surplusage.

Finally, Sandoz Masonry argues that only its interpretation of section 1451(f) accords with the purposes underlying ERISA and the MPPAA. *See* Brief for Appellee at 10, 13-17. Sandoz claims that any other reading would, as in this case, allow plans to wait for long, perhaps indefinite, periods before claiming withdrawal liability from employers. This consequence, it asserts, flies in the face of Congressional intent that withdrawal liability be collected promptly, as well as against interests in repose and prevention of litigating stale claims that inhere in any statute of limitations.

Sandoz's reading of the purposes and policies animating the MPPAA is curiously one-dimensional. To be sure, Congress has indicated that promptly collecting outstanding sums is desirable. That indication, however, is one aspect of the Act's more general purpose of ensuring that plans collect the amounts due from employers, a purpose subsidiary to the Act's overriding purpose of ensuring that plans remain solvent despite employer withdrawals (and thus able to provide pension payments

to workers who have earned them). *See, e.g., Connolly*, 475 U.S. at 214-17; *R.A. Gray & Co.*, 467 U.S. at 721-25; 29 U.S.C. §§ 1001, 1001a(c). The employer's reading of the statute would elevate one narrow statutory policy (favoring prompt collection) over the more general goal (collection) and overriding purpose (solvency) which animate and generate that narrow preference. There is no indication that the Act requires, as Sandoz would have it, either prompt collection or no collection at all. Rather, the Act requires that the plan sponsor act "as soon as practicable after an employer's complete . . . withdrawal." 29 U.S.C. § 1399(b)(1).

In contrast, our interpretation of the statute both facilitates collection and recognizes the practical difficulties attending the determination of when complete withdrawal occurs. We decline to mandate the triggering of the limitations period at a moment (complete withdrawal) when for reasons both practical and epistemological, *see supra* pp. 9-12, the plan may not be expected immediately to assess and demand withdrawal liability. We favor, instead, the moment that most ensures that plans will be able to collect the sums that employers owe them. Our decision thus accords with the Act's more important goals of providing means for recovery and ensuring the financial viability of the funds; our conclusion also accords with the ultimate aim that workers receive pension payments which they have duly earned.

Similarly, the nature of a limitations period does not require the result that Sandoz favors. The employer's view would, certainly, produce more "bite," in the sense of barring more claims, than the view we adopt. But the Act's general policies, as we have seen, actually disfavor impediments to collection. Little in the Act favors the result pressed upon us by Sandoz. Congress could have precisely limited the period that might elapse between the employer's complete withdrawal and the plan sponsors' demand for payment, but the National Legislature

instead required only that plan sponsors act "as soon as practicable after an employer's complete . . . withdrawal." 29 U.S.C. § 1399(b)(1). Section 1451(f) does not more directly address or limit the particular period at issue, for that time bar applies to all causes arising under the subtitle. In the absence of some specific direction, we decline to fashion section 1451(f)'s bar to provide an additional incentive (with "bite," to be sure) for prompt plan sponsor action or to provide employers with greater repose, when the Act's general policies, operation, and language counsel otherwise.

In the end, Sandoz's argument in this respect discounts the significant incentives that will, in the usual case, induce plan sponsors to act promptly to calculate, schedule, and demand payment of withdrawal liability. The plan sponsor that unduly delays in taking appropriate action puts at risk the solvency of the plan and thus may invite a claim for breach of fiduciary duty. *Cf. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (considering, in another ERISA context, scope of claims for breach of fiduciary duties); *McMahon v. McDowell*, 794 F.2d 100 (3d Cir.) (same), *cert. denied*, 479 U.S. 971 (1986). A delinquent sponsor may always be met in arbitration (as the plan sponsor in this case may well be met, *see infra* p. 19) with the argument that the plan has by virtue of delay run afoul of the Act's command that the plan sponsor demand payment of withdrawal liability "as soon as practicable after the employer's complete . . . withdrawal." 29 U.S.C. § 1399(b). Finally, although the issue is far from settled, the plan through delay may forfeit its claim to interest accrued during the period from complete withdrawal to demand for payment. *Compare Milwaukee Brewery Workers' Pension Plan v. Schlitz Brewing Co.*, 9 Employee Benefits Cas. (BNA) 2385 (1988) (no preassessment interest allowed) *with Loomis Armored, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 8 Employee Benefits Cas.

(BNA) 1899 (1987) (preassessment interest allowed). *See also* Brief for Amicus Curiae Pension Benefit Guaranty Corp. at 15 n.11 (additional material cited). In short, even if the meaning of section 1451 were not so clearly contrary to that which Sandoz urges, these incentives would make us reluctant to shape the meaning of the time bar to achieve the goal of reducing the possibility of the plan sponsor's delay.

III

Our cases firmly establish that the MPPAA emphatically favors arbitration as the means of resolving disputes "concerning a determination made under [29 U.S.C.] sections 1381 through 1399." 29 U.S.C. § 1401(a)(1); *see I.A.M. Nat'l Pension Fund, Plan A v. Clinton Engines Corp.*, 825 F.2d at 415; *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66 (D.C. Cir. 1987); *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204 (D.C. Cir. 1984).[6]

---

[6] The limited issue of section 1451's general application falls within the exception to arbitration outlined in *Stockton*, as interpreted by *Grand Union*. *See Grand Union*, 808 F.2d at 70 (limiting *Stockton* exception to cases in which "neither party timely presses the plea in abatement, *and* the court finds that deferring a court contest while the parties repair to arbitration 'will neither lead to the application of superior expertise nor promote judicial economy,' " quoting *Stockton*, 727 F.2d at 1210). In this case, both parties agreed that the statute of limitations claim (alone) should be resolved in court. *See* Tr. at 3-5, 38. Additionally, the purely legal issue of the time bar involves no special expertise available to the arbitrator, and, given the posture of the proceedings, judicial economy is certainly served by our disposition of this single issue. The unusual circumstances of this dispute make this case one of the rare exceptions to the overwhelming statutory preference for arbitration. Indeed, this case furthers those general policies by reserving all other issues for subsequent dispute before an arbitrator.

To the extent practicable, therefore, any further proceedings should be conducted initially before an arbitrator. The full range of determinations made under sections 1381 through 1399 may, unless other impediments arise (which we obviously have no occasion to foresee, much less pass upon), be pressed before the arbitrator. For example, our ruling today does not address the issue whether the plan acted "as soon as practicable after the employer's complete . . . withdrawal," 29 U.S.C. § 1399 (b)(1), in notifying Sandoz Masonry of its withdrawal liability, or upon what the consequences of the plan's lack of compliance (if there indeed were non-compliance) with that provision would be. Commendably, counsel for the plan sponsors assured us at oral argument (as counsel had assured the court below, Tr. at 38) that Sandoz may, if it chooses, raise this and other issues before the arbitrator.

* * * *

For the foregoing reasons, we vacate the district court's judgment and remand for further proceedings consistent with this opinion.

Judgment accordingly.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 88-7063 September Term, 1988
CA 87-01894

John T. Joyce, Trustee of the Bricklayers and Trowel Trades International Pension Fund, *et al.*,
Appellants

v.

Clyde Sandoz Masonry, d/b/a Griffith Masonry
Appellee

BEFORE: Starr, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed April 28, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN T. JOYCE, *et al.*,	)	C.A. 87-1894
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CLYDE SANDOZ MASONRY CONTRACTORS, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on defendants' motion to dismiss. On September 12, 1977, defendant Clyde Sandoz Masonry Contractors, Inc. ("Sandoz"), became a signatory to the collective bargaining agreement (the "Agreement") between the Arizona Masonry Contractors Association and the Bricklayers and Allied Craftsmen Union Local No. 3. The Agreement obligated Sandoz to contribute to the plaintiffs' trust fund. Sandoz terminated the Agreement effective June 30, 1981. Plaintiff brought this action to recover withdrawal liability on July 13, 1987.

The applicable statute of limitations is six years from "the date on which the cause of action arose." 29 U.S.C. sec. 1451(f)(1). A complete withdrawal that triggers withdrawal liability occurs when an employer "permanently ceases to have an obligation to contribute under the plan." 29 U.S.C. sec. 1383(a)(1). The obligation to contribute under the plan derives from the collective bargaining agreement. 29 U.S.C. sec. 1392(a)(1). When Sandoz terminated the Agreement on June 30, 1981, it ceased to have an obligation to contribute under the plan and thus incurred withdrawal liability. The Court concludes June 30, 1981, is the date the cause of action arose.

The fact that Sandoz made a payment on July 15, 1981, is irrelevant because it had no obligation to do so. It is the cessation of the obligation to contribute, not the cessation of payments, that determines whether a withdrawal has taken place. 29 U.S.C. sec. 1383(a)(1). If Sandoz had any obligation to contribute after it terminated the Agreement, it could only have been because the National Labor Relations Board (NLRB) determined that such an obligation existed. *See New Bedford Fishermen's Welfare Fund v. Baltic Enterprises, Inc.,* 813 F.2d 503, 505 (1st Cir. 1987). The NLRB has made no such determination.

Plaintiffs cite *Crown Coat Front Co. v. United States,* 386 U.S. 503 (1967) for the proposition that a cause of action does not arise under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. sec. 1451, until the administrative procedures thereunder have been exhausted. However, in *Crown Coat,* the applicable administrative procedures were initiated well within the six-year limitations period. Here, plaintiffs did not commence the administrative procedures contemplated by MPPAA until the date they brought this action, more than six years after Sandoz withdrew. If indeed the statute of limitations did not begin to run until after the plan sponsor initiated collection procedures (29 U.S.C. sec. 1399), then there would be no time limit at all upon a fund's commencement of suit. The Court concludes that plaintiffs failed to bring this action within the statute of limitations.

Accordingly, it is this 19th day of January, 1988, ORDERED, that defendant's motion to dismiss is GRANTED and this case is DISMISSED.[1]

GEORGE H. REVERCOMB, Judge

---

[1] This case is distinguishable from *Joyce v. Ace Construction Co.*, Civil Action No. 87-2136 (D.D.C. Oct. 27, 1987), in which the fund sent its notice to the employer within six years after the employer's withdrawal. This Court disagrees with *Ace Construction* to the extent it would allow a plan sponsor unlimited time to initiate collection procedures under MPPAA without affecting the timeliness of the lawsuit.

(2)

No. 89-321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE SANDOZ MASONRY,
d/b/a GRIFFIN MASONRY,
Petitioner,

v.

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

GEORGE KAUFMANN
IRA R. MITZNER
(Counsel of Record)
HARRIET GRANT
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Respondents

September 22, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

11 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-321

CLYDE SANDOZ MASONRY,
d/b/a GRIFFIN MASONRY,
Petitioner,

v.

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION [1]

STATEMENT OF THE CASE [2]

This case arises under the Multiemployer Pension Plan Amendments Act ("MPPAA" or "Act"), which amended the Employee Retirement Income Security Act ("ERISA") to establish that participating employers who cease contributing to a covered pension fund are, in certain circumstances, liable to the fund for "withdrawal liabil-

---

[1] Throughout this Brief, the Petition for Certiorari will be referred to as "Pet." Citations to the opinion below will be to the Appendix to the Petition and will be referred to as "A."

[2] For purposes of this brief, we accept petitioner's statement of the particular circumstances of this case.

ity."[3] The structure of the Act was described in the opinion below (A. 3-4):

> The Act requires employers who cease contributing to a multiemployer fund to pay what the statute refers to as "withdrawal liability," a sum that represents a portion of the fund's "unfunded vested benefits." See 29 U.S.C. §§ 1381, 1399 * * *.
>
> That sum is based upon the employer's date of "complete withdrawal" from a multiemployer plan. *See id.* §§ 1383, 1391. Special provisions define the "complete withdrawal" of employers, like Sandoz, engaged in the construction and building trades. See *id.* § 1383(b).
>
> The MPPAA grants the plan sponsor broad authority to assess and collect withdrawal liability. The Act requires that the fund "[a]s soon as practicable after an employer's complete . . . withdrawal" (1) calculate the employer's withdrawal liability, (2) set forth a schedule of payments, and (3) demand that the employer make payments pursuant to that schedule. See *id.* § 1399(b)(1). * * * If no arbitration has been initiated within the prescribed period, the amounts demanded are "due and owing on the schedule set forth by the plan sponsor" and subject to a plan sponsor's suit for collection. *Id.* § 1401(b)(1). If the employer fails within 60 days to meet a payment (following notice of that faliure), section 1399(c)(5)(A) deems the employer to be in default and allows the plan sponsor to "require immediate payment of the outstanding amount of an employer's withdrawal liability." *See id.* § 1399(c)(5).

---

[3] The Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (codified in relevant part at 29 U.S.C. §§ 1001-1381 (1982 & Supp. IV 1986), as amended by The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1208 (codified in relevant part at 29 U.S.C. §§ 1381-1461 (1982 & Supp. IV 1986)).

The Court then stated the issue between the parties and quoted pertinent portions of the statutory language which governs civil actions for withdrawal liability (A. 4-5):

> The parties are in dispute as to the time bar upon plan sponsor suits to collect withdrawal liability. Section 1451, which governs civil actions for withdrawal liability, provides that "[a] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." *Id.* § 1451 (a)(1). The same section contains the limitations provision, the meaning of which is pivotal to this case:
>
> > An action under this section may not be brought after the later of—
> >
> > > (1) 6 years after the date on which the cause of action arose, or
> > >
> > > (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.
>
> *Id.* § 1451(f).

A unanimous panel of the Court of Appeals held that a "plan is 'adversely affected' (and thus that a 'cause of action' arises) when the plan has not received payments which are due and owing." A. 8. This conclusion was reached in a thoroughly reasoned opinion for the Court by Judge Starr. As the opinion explained (*id*):

> The language of the statute (including the terms of section 1451 itself) points firmly in the direction of

> the conclusion that Sandoz's uncured failure to pay the sum demanded adversely affected the plan, thus giving rise to a cause of action. See 29 U.S.C. §§ 1399(c)(5), 1401(b). Additional support emerges in the statute's pervasive distinction between withdrawal liability and a plan's ability to receive payment of portions or the entirety of that sum. [Footnotes omitted.]

The remainder of Part II A of the opinion elaborated on these propositions (A. 8-13). Part II B of the opinion (A. 13-18) addressed each of Sandoz's (petitioner here) arguments for the proposition that the cause of action arises on an employer's complete withdrawal from participation in the plan. Part III of the opinion discusses the importance of arbitration in the statutory scheme and makes clear that Petitioner (and any other employer) may raise in arbitration the objection that the plan delayed unnecessarily in making a demand for payment.

ARGUMENT

The Petition for Certiorari does not assert that there is a conflict between the decision of the Court of Appeals in this case and a decision of this or any other court. Rather, the Petition is devoted to the contention that the Court of Appeals erred. Of course, that presents no sufficient reason for review by this Court. In any event, the Petition merely recycles arguments which were directly addressed and correctly rejected in the thoughtful decision of the Court of Appeals.

1. The heart of the matter is that under the MPPAA, an employer's withdrawal from a plan is not wrongful and does not give rise to a suit by the plan against the employer. (See, *e.g.*, A. 10: "By virtue of withdrawal alone (apart from the liability calculation and demand for payment), the employer is not immediately obligated to make payments, nor is the plan by virtue of withdrawal alone entitled to receive any such payments.") It

is the failure to make payments on the plan sponsor's demand which gives rise to suit. Accordingly, the "statute's express terms link a plan's ability to pursue judicial relief to an employer's failure to meet a payment demanded by the plan." A. 8, quoting 29 U.S.C. § 1401(b)(1). Section 1451(f)(1), which is at issue here, provides that a suit must be brought within "six years after the date on which the cause of action arose." Given the statutory scheme just described, that occurs when payment is demanded and refused, *i.e.*, when the plan is entitled to sue:

> [T]he plan sponsor's demand for payment triggers the employer's obligation to pay, and the employer's failure to make the scheduled payment in turn provides the predicate for a plan sponsor's suit. That is to say, the failure to pay gives rise to a cause of action. [A. 9.]

2. Petitioner's main thesis is that, unless the statute of limitations begins to run at the time of withdrawal, pension plans can wait indefinitely before claiming withdrawal liability and confront withdrawing employers with stale claims, and that the ruling deprives the funds of any incentive to collect withdrawal liability payments promptly in accordance with the congressional intent. *E.g.*, Pet. 8-9, 11, 16-17. The same argument was raised below (see A. 15) and decisively rejected by the Court. As the Court said: "There is no indication that the Act requires, as Sandoz would have it, either prompt collection or no collection at all." A. 16. The Court

> decline[d] to mandate the triggering of the limitations period at a moment (complete withdrawal) when for reasons both practical and epistemological [citing the Court's discussion of the language and structure of the Act], the plan may not be expected immediately to assess and demand withdrawal liability. We favor, instead, the moment that most ensures that plans will be able to collect the sums that employers owe them. [A. 16.]

Moreover, "the nature of a limitations period does not require the result that Sandoz favors," and "the Act's general policies, * * * actually disfavor impediments to collection." *Id.* "Congress could have precisely limited the period that might elapse between the employer's complete withdrawal and the plan sponsors' demand for payment, but the national Legislature instead required only that plan sponsors act 'as soon as practicable after an employer's complete . . . withdrawal. 29 U.S.C. § 1399 (b) (1)." A. 16-17.

Finally, petitioner's argument "discounts the significant incentives that will, in the usual case, induce plan sponsors to act promptly to calculate, schedule, and demand payment of withdrawal liability". A. 17. Specifically: (a) "The plan sponsor that unduly delays in taking appropriate action puts at risk the solvency of the plan and thus may invite a claim for breach of fiduciary duty;" (b) "A delinquent sponsor may always be met in arbitration (as the plan sponsor in this case may well be met) * * * with the argument that the plan has by virtue of delay run afoul of the Act's command that the plan sponsor demand payment of withdrawal liability 'as soon as practicable after the employer's complete . . . withdrawal.' 29 U.S.C. § 1399(b)." (See also A. 19); (c) "Finally, although the issue is far from settled, the plan through delay may forfeit its claim to interest accrued during the period from complete withdrawal to demand for payment." *Id.* However, it is not the function of the limitations provision, § 1451(f), to enforce the policy embodied in § 1399(b) (1), with the consequence that the plan would receive no payment.

3. Petitioner's other arguments can be dealt with shortly.

(a) Petitioner asserts that the "cause of action arose, within the meaning of Section 1451(f) (1) at the time of withdrawal." Pet. 10, emphasis omitted. This argument,

as the Court below observed, "fails to distinguish between the concept of withdrawal liability (which section 1381 addresses) and the issue when a cause of action arises, thus triggering section 1451(f)'s application to a plan sponsor's suit to recover payments of that liability (which is, of course, the issue before the court)." A. 13. Petitioner asserts that a "fund is *adversely affected* at the time of withdrawal because it is at that time that an employer ceases contributing to the plan." Pet. 11, emphasis in original. This statement is misleading even on petitioner's special use of the underscored words, because although *future* contributions cease upon withdrawal, so does the accrual of liabilities. In any event, the MPPAA does not make it actionable for an employer to withdraw. See p. 4, *supra*. Rather, as the Court explained, a plan is "adversely affected" *in the sense utilized in §§ 1401(b) and 1451* only by a plan's failure to pay. See A.10, 11-12, and pp. 4-5, *supra*.

(b) Petitioner's comparison between the MPPAA and other laws (the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964 (Pet. 13-14), avails it nothing.[4] Under both those statutes (and in the cases cited) the limitations period begins to run when the defendant has committed some wrongful act. To reiterate, under the MPPAA, the wrongful act is the failure to make demanded payments; withdrawal, the event from which petitioner would have the limitations period run, is simply not unlawful.

(c) In contending that the Court of Appeals' construction of the six-year statute of limitations renders the three-year statute in § 1451(f)(2) meaningless (Pet. 14), Petitioner simply disregards the Court's response that this "argument misconstrues the function of sec-

---

[4] This argument (of all those made in the Petition) was not dealt with in the opinion below, doubtless because it was not made in the employer's brief (and advisedly so).

tion 1451(f)'s time bar." A. 14. Section 1451 is not limited to a plan sponsor's suit for delinquent withdrawal liability payments, but "applies to suits brought by a wide variety of parties," as the Court demonstrated. A.14-15. Thus, "in a host of claims * * *, § 1451(f)(2) retains independent significance even following our ruling today." A.15.

(d) Petitioner asserts (Pet. 15-16) that there would be no "unwieldy collection mechanism" if the statute of limitations began to run at the time of withdrawal. Even if this were so, petitioner's position could not be reconciled with the design of the statute. However, Petitioner fails to give proper heed to the inherent difficulties of determining when complete withdrawal has occurred. This is true especially in the building and construction industry where Congress has made special provisions for determining what constitutes withdrawal. A. 10-11. A cessation of contributions in this industry, where work is seasonal and transitory, simply does not indicate withdrawal.

(e) Petitioner's final point (Pet. 16-17) has been discussed earlier. See p. 6, *supra*. It bears emphasis that Petitioner ignores the Court's holding (and Respondents' acknowledgement) that it is open to an employer to assert in the statutory arbitration proceedings that the plan sponsors did not act with sufficient expedition. See A. 16, 18-19.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

George Kaufmann
Ira R. Mitzner
(Counsel of Record)
Harriet Grant
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Respondents

September 22, 1989

(3)

No. 89-321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE SANDOZ MASONRY CONTRACTORS, INC.
AND GRIFFITH MASONRY, INC.,
Petitioners,

v.

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND
TROWEL TRADES INTERNATIONAL PENSION FUND, ET AL.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUY DAVID KNOLLER
3550 North Central Avenue
Suite 1401
Phoenix, Arizona 85012
(602) 230-1099
Counsel for Petitioner

October 4, 1989

6 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-321

In The

Supreme Court of the United States

October Term, 1989

Clyde Sandoz Masonry Contractors, Inc. and Griffith Masonry, Inc.,
Petitioners,

v.

John T. Joyce, Trustee of the Bricklayers and Trowel Trades International Pension Fund, et al.,
Respondents.

Reply to Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER IN REPLY

ARGUMENT

Certiorari is necessary because the lower court: "decided an important question of federal law which has not been, but should be, settled by this Court," S. Ct. R. 17.1(c); has in effect repealed the statute of limitations in MPPAA; and, has contravened the purposes of MPPAA.

1. A failure to make payments when demanded is not the only factor which gives rise to a cause of action

under MPPAA. Respondents have cavalierly ignored the statutory provision that a "substantial likelihood of inability to pay" also gives rise to a cause of action. *See* 29 U.S.C. § 1399(c)(5)(B). Respondents have also ignored that the funds are adversely affected at withdrawal. *See* 29 U.S.C. § 1001a(a)(4)(A).

2. Petitioner has never argued that its interpretation of the 6-year statute of limitation requires "either prompt collection or no collection." Brief in Opp. 5. Taking up to 6 years to collect is not prompt. The specific statutory mandate is that plan sponsors shall demand payment "as soon as practicable" after an employer's withdrawal. 29 U.S.C. § 1399(b)(1). The legislative intent and history that liability be expeditiously collected has also been ignored by Respondents.

3. Respondents suggest, as the lower court below held, that there are other incentives for expeditious collection. None worked here. For 6 years the Plan made *no effort whatsoever* to collect! Such "incentives" therefore are impractical, as demonstrated by this case. The only effective incentive is the interpretation of the statute of limitations urged by Petitioners.

4. Respondents also argue that Petitioners' assertion that a fund is adversely affected at the time of withdrawal is misleading. They suggest that "although future contributions cease upon withdrawal, so does the accrual of liabilities." Brief in Opp. 7. That argument totally ignores the purpose of MPPAA and the definition of "unfunded liabilities" for which withdrawal liability is assessed. Pet. 11. If there are unfunded liabilities at the time of withdrawal, it is current liabilities which are being claimed by assessment of a withdrawal liability to cover the payment in the future of vested benefits.

5. Respondents incorrectly assert that there is an inherent difficulty of determining when complete withdrawal has occurred. Respondents support that assertion by

stating: "A cessation of contributions in this industry [building and construction], where work is seasonal and transitory, simply does not indicate withdrawal." Brief in Opp. 8.

However, withdrawal is defined at the point in time when the obligation to contribute ceases, and either operations continue or there is a resumption of operations within 5 years – not at the point when contributions cease. 29 U.S.C. § 1383(b)(2). This is an easily determinable date. The applicable time is the time from which withdrawal liability accrues. 29 U.S.C. § 1381. Under any conceivable interpretation of the statute, the Plan cannot take 6 years to determine if there was a withdrawal. There simply is no "unwieldy collection mechanism." Either there was a continuation of operations, or a resumption of operations within 5 years (after contributions ceased). In either situation, the withdrawal date can easily be determined by the Fund. That date should trigger the running of the statute of limitations.

6. Petitioner did not ignore the lower court's holding that arbitration should resolve whether the Fund acted promptly to begin collecting any withdrawal liability. *See* Pet. 16 fn.1. Respondents argue that arbitrators can determine whether a fund which has delayed collection for more than 6 years, has fulfilled its statutory obligation to collect withdrawal liability "as soon as practicable." Leaving resolution of that issue to arbitrators all over the country will allow for disparate results, and would hamper uniformity in application. Moreover, leaving to arbitration a laches defense when the lower court has held the limitations period has not run simply makes no sense. *See* Pet. 16 fn.1.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Guy David Knoller
3550 North Central Avenue
Suite 1401
Phoenix, Arizona 85012
(602) 230-1099
Counsel for Petitioner

October 4, 1989